U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue date: 18Jun2002

Case No.: 2001-LHC-1703

OWCP No.: 07-157248

In the Matter of:

LAVAR JOHNSON,
Claimant

v.

ELMWOOD MARINE SERVICES,
Employer

and

AMERICAN LONGSHORE MUTUAL ASSN.,
Carrier

APPEARANCES:

WILLIAM S. VINCENT, JR. ESQ.,
On Behalf of the Claimant

MARK LATHAM, ESQ.,
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"). The claim is brought by Lavar Johnson, Claimant, against his former employer, Elmwood Marine Services, Respondent, and American Longshore Mutual Association, Carrier. Claimant asserts that on July 22, 2000, he was injured while

working as a welder at Respondent's facility. A hearing was held on November 14, 2001 in Metairie, Louisiana, at which time the parties were given the opportunity to offer testimony, documentary

evidence, and to make oral argument. The following exhibits were received into evidence:

1) Claimant's Exhibits Nos. 1-20; and

2) Respondent's Exhibits Nos. 1-22.[1]

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is rendered after giving full consideration to the entire record.[2]

STIPULATIONS[3]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue;

2) Claimant was injured on July 22, 2000;

3) An employer/employee relationship existed at the time of the injury;

4) The injury arose within the course and scope of employment;

5) Employer was notified of the injury on July 22, 2000;

6) A Notice of Controversion was filed on December 4, 2000;

7) An informal conference was held on February 22, 2001;

8) Claimant received temporary total disability benefits from July 26, 2000 through November 28, 2000 at $266.78 per week for a total of $4,802.04; and

9) Partial medical benefits were paid.

ISSUES

The unresolved issues in these proceedings are:

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[1] Respondent's Exhibit No. 23 was received post-trial.

[2]The following abbreviations will be used in citations to the record: CTX- Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

[3]CTX-1

1) Fact of Injury.

2) Nature and Extent of Disability.

3) Reasonable and Necessary Medical Benefits.

4) Average weekly wage.

5) Penalties and Attorney's Fees.

SUMMARY OF THE EVIDENCE[4]

I. TESTIMONY

Joey Peter Muth

Joey Muth is the president and owner of Marine Electric Company. He is currently a marine electrician and does troubleshooting on ships, tugboats and barges. He has a high school education, and has worked with marine electrical systems for twenty years. Twenty to thirty percent of his business is with Respondent or its affiliates. Mr. Muth testified that he was retained to investigate the work site where Claimant's accident occurred. He met with Sidney Gassen and Paul Truch, who gave him a copy of the accident report. Mr. Muth inspected the site of the accident approximately a month and a half prior to the trial. TR. pp. 38-48, 338-341.

It was his understanding that the welding lead had arced and become attached to the metal surface of the barge. Claimant was burned when he tried to get this welding lead loose. He opined, as an electrician, that if Claimant were grounded at the time by wearing rubber boots, he would not have been shocked. Mr. Muth was of the opinion that Claimant was not shocked, because in a human being there would not be enough conductivity in a two or three second contact to cause an arc or burn. Mr. Muth did

testify, however, that if Claimant was leaning against the coaming and pulling a lead with no gloves, he could receive a DC shock. He stated that he did not know what type of damage such a shock would do to a person. TR. pp. 336-367.

Lavar Johnson

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[4]In some of the medical records submitted into evidence, the physicians make reference to an injury to the "right" hand. These records were later corrected to reflect an injury to the left hand. After examining the evidence, along with the direct testimony of several physicians, this Court has determined that the initial reference to an injury on the "right" hand was a mere typographical error, and that the testing and examinations were performed on the left hand and shoulder area. Since the error was typographical, and thus, did not affect the content of the reports or testing results, these medical records will be considered credible, as corrected, by this Court.

Lavar Johnson, Claimant, is a 23 year-old man who completed high school and 2.5 years of vocational/technical school in welding. He began working for Respondent in February 1998. Claimant added that his job with Respondent was his first welding job. At the time he was hired by Respondent, he passed a pre-employment physical. Claimant stated that he had no prior history of shoulder injuries. Claimant testified he worked Monday through Friday, but also worked on Saturdays and Sundays. His employment position consisted primarily of outside work, and he was sent home during bad weather. Claimant added that he usually worked every other weekend, but if he was needed on the other weekends, he would work. TR. pp. 52-58.

Claimant's work with Respondent consisted primarily of repairing barges. He occasionally worked in the hopper (inside) of a barge. Claimant testified that he had to carry his welding bucket with welding rods, face shield, leather gloves, whip, chipping hammer, welding brush and welding jacket with him, weighing fifty pounds or more, into the barge. As to the accident, Claimant testified that it occurred in the morning. He stated that he was pulling his welding lead out of the inside of a barge with both hands. Claimant opined that the welding lead itself had a gash or something in it, because when he grabbed the lead, he felt electricity flow into his left hand and radiate to his shoulder. He stated that he was not able to let go of the lead for approximately 4 or 5 seconds. When he did throw the lead down, it hit the deck and sparked. TR. pp. 59-67, 192-194.

Claimant immediately reported the accident to Paul Truch, his supervisor. He noticed that blood was dripping from his left hand, and he was in severe pain. Mr. Truch offered to take Claimant to River Parishes Hospital, but Claimant declined and drove himself to the hospital. By the time he arrived at the hospital, his left arm was numb. Claimant testified that he informed the emergency room doctor, Dr. Cummiskey, that he received a jolt from electricity. He was in River Parishes Hospital for a few days, but was eventually transferred to Baton Rouge General Hospital. At Baton Rouge General Hospital, he was treated by Dr. John Williams for the burn on his left hand. On referral from Dr. Williams, Claimant saw Dr. Carolyn Baker, a neurologist. He stated that initially she could not test him, since his left hand and arm were bandaged to the elbow. However, an EMG Nerve Conduction Velocity study was eventually performed, and Claimant was told by Dr. Baker that he had nerve damage. TR. pp. 67- 78, 150-160.

In August 2000, Claimant began physical therapy at St. John's Physical Therapy. He stated that he was treated for his left hand and shoulder. Claimant attended therapy from August 30, 2000 through October 26, 2000. He felt that the exercises were helping. At the end of October, Claimant was told to stop attending therapy due to a problem with the insurance company. On Dr. Williams' recommendation, Claimant sought out a neurologist. He eventually chose Dr. Maria Palmer. Claimant testified that he was still having problems in his shoulder and had been doing the home exercises given to him, but stopped as he could not tolerate the pain. Dr. Palmer examined him and referred Claimant to an orthopaedist. Prior to seeing the orthopaedist, Claimant saw Dr. Walter Truax, a neurologist, at Respondent's request. Claimant felt Dr. Truax treated him as if he were lying. Claimant chose Dr. Stuart Phillips as his orthopaedist. When Claimant went to Dr. Phillips, he was given an injection in his shoulder, but it did not help. Claimant said that he stopped using his shoulder after physical therapy was terminated by Employer, because shoulder movement was too painful. TR. pp. 80-89.

Claimant testified that he was examined by Dr. August Sumner, at Respondent's request, for

a repeat EMG/Nerve Conduction Velocity study. Claimant believed that Dr. Sumner's test, unlike Dr. Palmer's test, was limited to the hand area and not his arm. Finally, Claimant saw Dr. Gregor Hoffman, an orthopaedic surgeon, at Respondent's request. He testified that he was informed his shoulder was frozen from lack of use. TR. pp. 90-97.

Claimant stated that he is right-handed, and that his left hand is the weak one. He opined that he can open and close the hand, but the most he can lift with it is ten pounds. Claimant has not returned to work with Employer. He testified that in November 2001, he began working part-time with ECM Janitorial Service, transporting workers in the company van. This position is for 15-20 hours a week and pays approximately $5.75 per hour. TR. pp. 92-100.

Claimant reported that he attempted to apply for all of the jobs listed by Nancy Favaloro. The first job he applied for was a computer position at Allfax. He filled out an application a week prior to the trial and has not heard back from them. The second job listed by Ms. Favaloro was for Pinkerton Security. Claimant testified that he contacted them and was told that they were accepting applications. However, he was told that there was nothing available for him. Claimant added that he was not interested in the position anyway, because it pays $5.15 per hour, which is less than he currently makes. Claimant added however, that he would take a full time position even if it did pay less. TR. pp. 140-144.

The next job on his list was for a position at Circuit City, but Claimant testified that he could not find the location. He called to see if they were accepting applications and was told that they were not. Claimant also sought a position at New South Parking. He testified that he could not find the listed location, nor could he find a phone number for New South Parking in the phone book. The next job on the list was for a valet parking attendant and shuttle bus driver at the Treasure Chest Casino. Claimant testified that he had already applied for this position, but returned to the Casino and reapplied. At that time, he was told he could not be a shuttle bus driver, because he did not have a commercial driver's license. Claimant was told that they would contact him, but has not received a response. The last position given to Claimant was a weigh station monitor for trucks. This position required monitoring trucks that pulled up on a weigh scale. Claimant testified that he filled out an application for the position, but has not heard back from them. TR. pp. 140-149.

Walter Truax, M.D.[5]

Dr. Truax is a board-certified neurologist who saw Claimant at Respondent's request on January 29, 2001. Claimant indicated to him that he burned the left index finger when he touched a portion of an uninsulated rod. He opined from Claimant's medical records and subjective complaints, that his injury was inconsistent with a finding of a lower brachial plexus injury. Dr. Truax did note that there were signs of fibrillation in his nerve studies, which he determined was abnormal. TR. pp.

[5]The medical records and reports from Dr. Truax are reproduced as RX-7. These records have been considered by the Court in conjunction with his testimony at the formal hearing and will be referred to in the body of the opinion to the extent they add to his testimony.

105-109; RX-7.

Claimant's chief complaint at the time of his examination were headaches, which occurred when his neck hurt. He complained of neck pain radiating into his shoulder and a squeezing sensation on top of the left shoulder. There was numbness in the fingertips, and Claimant indicated that he could not extend his fingers. Dr. Truax noted, upon a physical examination, that Claimant's movement testing in the left hand and shoulder area was inconsistent with his complaints. Additionally, Dr. Truax noted no evidence of muscle atrophy, which would be common with a nerve injury. TR. pp. 105-112; RX-7.

It was Dr. Truax's impression that Claimant suffered an electrical injury, but that there was no clinical evidence of brachial plexus injury on his exam. He felt Claimant could return to work at any occupation. Nevertheless, Dr. Truax recommended a repeat EMG in January 2001. Dr. Truax acknowledged that most brachial plexus injuries will cure themselves over time. He testified that someone with an electrical shock could have injuries to muscles and tendons, which could develop into a frozen shoulder. However, he stated that he saw no evidence of this condition at the time of his examination. TR. pp. 112-113, 119-125; RX-7.

Connie Johnson

Connie Johnson, Claimant's wife, testified that she has been married to Claimant for two years. She stated that prior to the accident on July 22, 2000, Claimant had no physical problems and led an active lifestyle. The first two months after the accident, Claimant complained of hand, shoulder, and chest pain. His hand was in a wrap during this time, so he could not use it. Mrs. Johnson stated that Claimant did exercises for his left shoulder at home until the pain got too severe. She opined that Claimant's hand condition has improved, and that he is gaining some strength back in his left hand. However, the hand is still not strong enough to allow him to pick up their nine month-old baby. TR. pp. 198-203.

Paul Truch

Mr. Truch testified that he was Claimant's supervisor at Elmwood Marine, Inc. on the day of the accident. He stated that Claimant came to him and told him he was injured. At that time, he took Claimant to his office, where ice was put on Claimant's hand. Mr. Truch next called Sidney Gassen, and they both decided to send Claimant to River Parishes Hospital. TR. pp. 202-211.

It was Mr. Truch's understanding that Claimant was injured while pulling a welding lead in or out of the barge. This lead arced on the deck, and Claimant burned his finger trying to free it. He noted that Claimant appeared to be in pain, but that there was no evidence of bleeding. Mr. Truch stated that he did not have a long discussion with Claimant about the accident as he wanted to get Claimant to a doctor. He was not told by Claimant if he received an electric shock in addition to the burn. Mr. Truch felt that Claimant was a good worker who did what he was told. TR. pp. 214-228.

Sidney Gassen

Mr. Gassen is the River Manager for Respondent. He stated that the Elmwood Reserve

facility, where Claimant worked, is open seven days a week. Employees usually choose the days they work during the week and are required to work one weekend a month. Mr. Gassen testified that he was not working on site at the time of the accident. He was notified that Claimant had been burned by Paul Truch. TR. pp. 229-235; 248-250.

Mr. Gassen stated that he investigated the accident when he came into work, two days after it occurred. It was his understanding that a welding lead arced on the barge, and Claimant touched it, causing a burn. He opined that the arc should have left a mark on the deck. However, Mr. Gassen testified that he did not find any fresh marks on the deck. Mr. Gassen stated that he also looked at the welding lead in question. He stated that he did not see anything on the line but small nicks. The incident report he prepared notes that there was probably a bare spot in the welding line. TR. pp. 229-242; CX-11, pp. 31-47.

Mr. Gassen visited Claimant in the hospital two days after the accident. He learned for the first time that Claimant was shocked as well as burned. Mr. Gassen stated that Claimant never told him he had been electrocuted. An unidentified individual in Claimant's room told him that Claimant had been shocked. However, Mr. Gassen did not put this alleged injury in his report, because he did not know the identity of the individual. TR. pp. 236-242.

Austin Sumner, M.D.[6]

Dr. Austin Sumner is board-certified in electrodiagnostic medicine. He also has the British equivalent of board certification in clinical neurology. Claimant was referred to him by Respondent. He examined Claimant on August 22, 2001 and performed electrodiagnostic testing on September 19, 2001. Dr. Sumner stated that Claimant indicated he had prior problems "off and on" with his left shoulder. Claimant relayed current symptoms of persistent numbness and weakness restricted to his hand. He

opined, from examining Claimant's burn scar and alterations in Claimant's skin pattern on the left hand, that the pathway of the electrical current entered through his hand at the base of the finger and exited through the tips of the fingers. TR. pp. 265-277; RX-11, pp. 1-2.

Dr. Sumner opined, from examining the pattern of the electrical shock, that there was no reason to suspect injured structures higher up in the arm. Additionally, he stated that his electro diagnostic tests revealed no evidence whatsoever of a nerve injury in the hand. Claimant was neurologically intact. Dr. Sumner noted that Claimant's perceived inability to move certain fingers on the left hand made no sense, since he could freely move his thumb. He added that if Claimant had sustained a brachial plexus injury, the NCV test would have showed some abnormalities. This test showed normal nerve functioning. Dr. Sumner testified that he tested Claimant's entire nerve

[6]The medical records and reports from Dr. Sumner at the LSU Health Sciences Center are reproduced as RX-11. These records have been considered by the Court in conjunction with his testimony at the formal hearing and will be referred to in the body of the opinion to the extent they add to his testimony.

pathway, from the fingers to the spinal cord. His overall impression was that the study was normal. Dr. Sumner testified that his conclusion was consistent with Dr. Baker's EMG/NCV studies, in that her findings were at the threshold between normal and abnormal. After examining her report, he opined that her findings did not reflect a brachial plexus injury. TR. pp. 280-300; RX-11, pp. 1-2.

Nancy T. Favaloro[7]

Ms. Nancy Favaloro testified as an expert in vocational rehabilitation counseling. She met with Claimant on July 23, 2001 and issued a report on September 6, 2001. As part of her evaluation, she examined Claimant's medical records through September 6, 2001. Her impression at the time of the interview was that Claimant was cooperative and straightforward. Ms. Favaloro determined that Claimant possesses the skills to use a variety of tools and has the capability to learn new skills through on-the-job training. She found six potential jobs for Claimant. Ms. Favaloro testified that she also sent approval letters for the positions to Drs. Phillips, Palmer, Truax, and Hoffman. Dr. Phillips did not respond, and Dr. Palmer indicated that she did not feel comfortable rendering an opinion on the positions. Drs. Truax and Hoffman approved all six positions identified on the labor market survey. TR. pp. 300-310; RX-16.

The first position identified in the report was a weigh station monitor for the State of Louisiana. It is sedentary with on-the-job training and pays $9.31 per hour, the mid point salary for a GS-9 position. The second job she located was an unarmed security guard position with Pinkerton Security. This position is mainly sedentary and pays minimum wage to start, with an increase to $6.00 per hour after ninety days. The position requires 32 to 40 hours of work per week. Ms. Favaloro testified that her company contacted the employer from October 29, 2001 through November 1, 2001, and Claimant had not applied during that period. The third job on the list was at Treasure Chest Casino as a shuttle bus driver. She stated that a full commercial driver's license would not be needed, just an endorsement on the existing license for which you take a written test. This position would be full-time at $7.00 per hour. The fourth job was a full-time position at Allfax, recycling and rebuilding toner cartridges. This employer provides on-the-job training and pays $7.50 per hour. The fifth job listed was for a sales associate position at Circuit City in Kenner, Louisiana. She stated that applications for the Kenner store are accepted at another location. This position pays $7.25 per hour and requires lifting of less than 20 pounds. The last job located for Claimant was at New South Parking as a booth cashier. It pays $6.15 per hour, and would entail approximately 22 to 30 hours of work per week. TR. pp. 312-318; RX-16.

Ms. Favaloro testified that during the interview process, Claimant informed her that he had not applied for a job, as he was unsure of the future and awaiting shoulder surgery. She stated that these positions were available as early as September 2001 and are routinely available throughout the year. TR. pp. 314-320.

Karmen Wolverton

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[7]The vocational rehabilitation report from Nancy Favaloro is reproduced as RX-16. This report has been considered by the Court in conjunction with her testimony at the formal hearing and will be referred to in the body of the opinion to the extent it adds to her testimony.

Karmen Wolverton, physical therapist, performed a functional capacity evaluation (FCE) for Claimant on November 6, 2000. Ms. Wolverton testified that Claimant received a prescription for the FCE from Dr. Williams. Claimant was also referred to her from MEMCO, Respondent's parent company. The FCE took six to eight hours to complete. She stated that Claimant disclosed basic medical information and treatment for his current injuries. At the initial interview, he indicated that his pain was in the severe range in his left shoulder and hand, and he suffered from dull headaches. The basic findings during the objective testing, however, showed some inconsistencies suggesting non-organic illness behaviors. She testified that his range of motion was quite limited when specifically tested, but was much better when Claimant performed the same movements while distracted. Additionally, Claimant's strength level testing was inconsistent. She concluded that out of 19 questions for non-organic signs of disability, 14 of these were assessed as positive in Claimant's case. This included findings of submaximal effort on static and dynamic testing of both arms as well as grip testing for the hands. TR. pp. 367-385; RX-6.

Ms. Wolverton noted that she saw no signs of muscle atrophy in Claimant's left shoulder and hand areas, although Claimant reported prolonged disuse. She stated that his physical demand level could not accurately be determined based on all of the inconsistencies in his testing. It was her opinion, however, that he did demonstrate the ability to perform at least at a sedentary level with lifting of no more than ten pounds. On cross examination, Ms. Wolverton acknowledged that physical therapy helps prevent the muscles in the shoulder from tightening. She concluded that the results of the FCE testing were more indicative of what Claimant was willing to do as opposed to what he could actually do. TR. pp. 413-420; RX-6.

Ms. Wolverton opined that in her experience a "frozen" shoulder causes limitation of movement in raising the arm, however, Claimant exhibited no such limitation in movement. Ms. Wolverton noted that she saw Claimant after his therapy had ended and conceded that a frozen shoulder would not have developed in the short time period between the two events. She added that a surgical candidate who does not get physical therapy is more likely to develop a frozen shoulder. TR. pp. 413-425; RX-6.

Stephen A. Barrios

Mr. Barrios is employed by Elmwood Marine Services as Vice-President of Administration. He testified that he handles workers' compensation claims and makes local decisions involving the claims. Mr. Barrios was aware of Claimant's injury and knew that he was being treated for a burn and was undergoing neurological testing. He added that it was the opinion of the emergency room staff that the Baton Rouge hospital could more effectively treat his burn injury. Mr. Barrios testified that he also monitored the progression of Claimant's occupational therapy. When Dr. Williams released Claimant from treatment for the burn injury, Mr. Barrios suspended Claimant's compensation and medical benefits. TR. pp. 430-442.

Mr. Barrios testified that he did not know additional occupational therapy had been recommended by Dr. Williams as of October 26, 2000. At the hearing, Mr. Barrios was shown the November 21, 2000 report of Dr. Williams calling for additional occupational therapy. He testified he still would have discontinued the occupational therapy even if additional therapy was requested, because the burn injury had healed. Mr. Barrios was only worried about the burn injury and had no

opinion as to the electrical shock injury. TR. pp. 442-450.

Edward J. Ryan

Mr. Ryan is an expert in vocational rehabilitation counseling hired by Claimant. He met with Claimant on November 8, 2001. At that time, Claimant told him that he had not applied for any of the jobs that Ms. Favaloro provided. He opined that Claimant can do all of the jobs found by Ms. Favaloro. Mr. Ryan stated that he did have concerns about the weigh station monitor salary, and personally contacted the Civil Service Commission. At that time, he was informed that the position is a GS-9, and the starting pay is $7.03 per hour. TR. pp. 451-456.

II. MEDICAL DEPOSITIONS AND RECORDS[8]

Richard Roberts, M.D.

Dr. Richard Roberts is board-certified in Emergency Medicine. He examined Claimant in the Emergency Room at River Parishes Hospital on the date of the accident. Claimant's chief complaint was a burn to his left hand near his index finger. Dr. Roberts contacted the foreman at Elmwood Marine, who told him that Claimant came in contact with a 240 volt DC line discharge. Dr. Roberts' understanding of the nature of the accident was that Claimant grabbed a line attached to a large generator unit with his left hand. He could not remember if Claimant actually told him that he got shocked, he was focused on the burn. RX-18, pp. 14-19.

Dr. Roberts did not find any nerve damage at the time he examined Claimant. Claimant had a third degree burn to the hand, and Dr. Roberts was concerned about the possibility of a DC shock. He called
in Dr. Cummiskey to treat the burn. While in the hospital, Claimant was also seen by an orthopaedist, Bill
Johnson. Dr. Johnson noted that the median nerve in Claimant's left hand had been affected. Dr. Roberts testified that Claimant did not have this condition when he examined him, but added that it is not unusual for this type of condition to take some time to present itself. RX-18, pp. 28-39.

Dr. Roberts testified that with an electrical burn, the presence of an exit wound depends on amperage and grounding. He felt that during his examination, that Claimant was very cooperative and was not malingering. RX-19, pp. 55-57.

[8]In some instances, both parties submitted duplicate copies of the medical depositions and records in this section. Since evidence submitted into the record can be used by either party, this Court will only reference one party's copy of the records.

Robert D. Cummiskey III, M.D. (By deposition CX-16 & RX-20)

Dr. Robert Cummiskey is board-certified in general surgery. He examined Claimant on July 22, 2000 in the Emergency Room at River Parishes Hospital. At that time, his diagnosis was a third degree electrical burn to the left hand. He also observed a deficit in the distribution of the median nerve on Claimant. He explained that the median nerve is a branch of the brachial plexus. In addition, Claimant had decreased sensation on the palm and dorsum of his left hand as well as on the thumb, pointer, and middle finger. He could not flex any of his fingers. Claimant was subsequently transferred to Baton Rouge General Hospital so that he could optimally be treated by a burn specialist. Dr. Cummiskey testified that he could not recall if Claimant made any shoulder complaints at the time of his examination. CX-16, pp. 6-16.

Dr. Cummiskey also examined Claimant on July 23, 2000. He testified that Claimant still exhibited decreased sensation in the left hand and the inability to flex his fingers. He examined Claimant on July 24, 2000, at which time he noted that the median nerve deficit was unchanged. CX-16, pp. 18-22.

Dr. Cummiskey opined that Claimant was consistent in his complaints. He stated that he would defer to the physicians at Baton Rouge General Hospital as to the extent of any nerve injuries. It was his opinion that Claimant sustained an electrical burn from the accident. He stated that while there would be no way to medically determine how Claimant was burned, the neurologic deficit would not make sense unless there was an electrical shock. CX-16 pp. 31-35.

John Williams, M.D.[9]

Dr. Williams is a board-certified plastic surgeon. He treated Claimant at Baton Rouge General Hospital beginning on July 26, 2000. Claimant reported that he was doing welding work, when he came in contact with some electrical welding equipment and sustained his burns. Claimant complained of numbness in the left fingers and decreased touch of the index and long finger and half of the ring finger. He also complained of inability to flex and extend his fingers. At the time of the initial examination, Dr. Williams thought it possible that Claimant had a neurological injury. Since he could not document a potential neurological injury or know the extent of it, he referred Claimant to a neurologist, Dr. Carolyn Baker. RX-17, pp. 1-16.

Dr. Williams interpreted Dr. Baker's testing, conducted on August 8, 2000, to suggest chronic denervation changes related to a brachial plexus injury. He sent Claimant to occupational therapy for exercises that would prevent loss of muscle strength and loss of his range of motion. Dr. Williams opined that he has seen a brachial plexus injury caused by electrical trauma. He added that Claimant's CPK levels, from the neurological report, were high, but not as high as is common with shoulder injuries. However, he testified that he would generally defer to Dr. Baker regarding the

[9]The medical records and reports from Dr. Williams are reproduced as RX-4, RX-22, and CX-9. These records have been considered by the Court in conjunction with his deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

particulars of the brachial plexus injury. RX-17, pp. 22-26, 56-58; RX-5, p.29.

Dr. Williams last saw Claimant on November 21, 2000. It was his opinion that Claimant needed to be re-evaluated by Dr. Baker due to the conflicting reports from two occupational therapists. He also ordered additional occupational therapy. Dr. Williams testified that he did not release Claimant to return to work and felt it reasonable to keep Claimant off of work until he was released by a neurologist. He related Claimant's symptoms to the July 22, 2000 welding accident. RX 17, pp. 46-52.

Carolyn Baker, M.D. (By deposition RX-21 and CX 14)[10]

Dr. Carolyn Baker, a board-certified neurologist, performed an EMG/Nerve Conduction Study on Claimant on August 8, 2000. Her report stated that she tested the right upper extremity. She later corrected this on March 7, 2001 to reflect that she examined the left extremity. The technician, Mr. Groff, performed the nerve conduction study, and she performed the EMG. The nerve conduction study was essentially normal. However, the EMG showed some abnormalities in that there was marked increased insertional activity on Claimant's first dorsal. RX-21, pp. 3-6, 25-52.

Dr. Baker's impression was that Claimant's EMG needle examination was not normal. Taken in conjunction with his history and his subjective complaints, she opined that this abnormality was due to a brachial plexus injury. In her judgment, Claimant had a mild nerve injury. She opined that it was mild, because he was still able to use the muscle but limited by pain. Dr. Baker added that Claimant's complaints of hand weakness and numbness to Dr. Maria Palmer on December 18, 2000 support a finding of a brachial plexus injury. She estimated that the healing period for this type of injury would be from several weeks to six months. Dr. Baker testified that she tested the nerve area from above his elbow to the tips of his fingers. She noted no evidence of nerve damage or muscle wasting in Claimant's upper arm. Dr. Baker added, however, that those type of changes would occur over time if the damage was severe enough. Dr. Baker prescribed physical therapy for Mr. Johnson to eliminate the possibility of him not using the shoulder due to pain and developing a frozen shoulder. RX-21, pp. 8-15, 64-76.

Dr. Baker felt that if Claimant had a brachial plexus injury as indicated by herself and Dr. Palmer, it would be reasonable for Claimant to have a full neurological evaluation prior to returning to full duties. She stated that the other EMG study, performed in September 2000, would not rule out that Claimant had a brachial plexus injury. It could mean the brachial plexus injury had merely improved. In the absence of any other traumas to the left extremity, Dr. Baker related Claimant's symptoms to the July 22, 2000 accident. RX-21, pp. 88-97.

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[10]The medical records and reports from Dr. Carolyn Baker at The Neuromedical Center are reproduced as RX-10 and CX-7. These records have been considered by the Court in conjunction with her deposition testimony and will be referred to in the body of the opinion to the extent they add to her testimony.

Maria Palmer, M.D.[11]

Dr. Palmer is a board-certified neurologist. She first examined Claimant on December 18, 2000. The history she was given was that in July of 2000, Claimant touched an uninsulated part of a welding line and was shocked. Claimant complained of shoulder pain on his initial visit. After examining Claimant, Dr. Palmer felt Claimant had a minor brachial plexus injury. Claimant exhibited decreased sensation in the medial nerve distribution, specifically in the last four fingers of his left hand. Additionally, she testified that Claimant's decreased sensation symptoms indicated a problem higher up on the left extremity, such as the brachial plexus nerve group. She reached this conclusion prior to receiving Dr. Baker's EMG report of a brachial plexus injury. Dr. Palmer opined that this injury was so minor, she prescribed home therapy. CX-15, pp. 4-25; CX-6, p. 4.

Dr. Palmer also examined the results of Dr. Carolyn Baker's neurological tests. She testified that Dr. Baker's EMG findings coincided with her diagnosis. She last saw Claimant on February 12, 2001. He reported that he had not been able to perform the home therapy that she prescribed. Dr. Palmer stated that brachial plexus injuries, like all nerve injuries, take a long time to heal. On her report, she noted that Claimant suffered from bursitis in his left shoulder. She added that while he did not exhibit symptoms of a frozen shoulder, the limited range of motion suggested that developing this condition was likely. CX-15, pp. 26-38, 55-58.

Dr. Palmer went on to testify that a frozen shoulder is a natural progression of a painful shoulder that is not exercised enough. The only way to cure shoulder problems, in cases like Claimants, is exercising the shoulder. She stated that Claimant's bursitis in his shoulder may have progressed to the point that he did not move it. CX-15, pp. 40-45.

As to Claimant's electrical injury, Dr. Palmer testified it is not necessary for someone to have an exit burn when they are shocked, and that an AC joint separation can occur with shock injuries. Dr. Palmer felt that both Claimant's brachial plexus injury and his frozen shoulder were related to his shock from his July 22, 2000 accident. She added that Claimant's shoulder was on its way to becoming frozen when she last examined him. CX-15, pp. 50-59.

Stuart Phillips, M.D.[12]

Dr. Stuart Phillips is a board-certified orthopaedic surgeon. He examined Claimant on March 26, 2001. Claimant reported a history of an electrical burn and shock to his left hand, after which he developed pain and numbness in his hand and shoulder with limited motion. Dr. Phillips indicated

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[11]The medical records and reports from Dr. Palmer are reproduced as CX-6. These records have been considered by the Court in conjunction with her deposition testimony and will be referred to in the body of the opinion to the extent they add to her testimony.

[12]The medical records and reports from Dr. Phillips at The Louisiana Clinic are reproduced as RX-8 and CX-4. These records have been considered by the Court in conjunction with Dr. Phillips' deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

both on his report and in deposition that Claimant was wearing a splint on his "right" wrist, but later stated that it was really the left side. A physical examination of the left shoulder showed posterior joint pain, pain and tenderness in the back of the shoulder, and limited abduction, flexion and internal reaction. Dr. Phillips testified that Claimant exhibited numbness in his left fingers, however he did admit that the testing methods used for numbness were subjective. Dr. Phillips opined that Claimant had frozen shoulder syndrome. He testified that his diagnosis was based on his examination and the history of the electrical injury. Dr. Phillips opined that although Claimant initially might have had full range of motion in his shoulder, he gradually lost it as the pain in motion increased. He felt the frozen shoulder was caused by the July 22, 2000 accident. CX-13, pp. 4-25; RX-8, pp. 1-10.

Dr. Phillips ordered an MRI of Claimant's left shoulder. This test revealed distraction of the clavicle relative to the acromion. He opined that the old AC joint separation, identified in the MRI scan, probably resulted from the July 22, 2000 electrical injury, since there appeared to be no other traumas in Claimant's medical history. On March 26, 2001, Dr. Phillips injected Claimant's shoulder but it did not give Claimant any relief. Dr. Phillips last saw Claimant on September 6, 2001. He recommended an arthroscopic exam with an arthroplasty of the AC joint. CX-13, pp. 32-37; RX-8, pp. 1-10.

Dr. Phillips opined that as of September 6, 2001, Claimant could do work using his right hand. Claimant would not be able to manipulate large objects or lift heavy things. Dr. Phillips opined that Claimant probably could drive an automatic vehicle but not a truck. He does not think Claimant could be a weigh station monitor, because Claimant cannot lift up to twenty pounds. If Claimant underwent surgery, Dr. Phillips could not opine as to what work Claimant could do until he undergoes vigorous rehabilitation to restore the lost range of motion. CX-13, pp. 35-43; RX-8, pp. 1-10.

Dr. Phillips felt Claimant has two problems, a frozen shoulder and the AC joint separation. The brachial plexus injury and the AC separation are in the same area. The fact that both problems were within the same area indicates there was damage in the shoulder area from the electrical shock. Dr. Phillips went on to say that had physical therapy been continued after October 26, 2000, Claimant would have had a better chance of preventing a frozen shoulder. He believes that Claimant's frozen shoulder, AC joint separation, and brachial plexus injury are all from the July 22, 2000 accident. CX-13, pp. 62-67; RX-8, pp. 1-10.

Gregor James Hoffman, M.D.[13]

Dr. Gregor Hoffman is a board-certified orthopaedist who examined Claimant on November 2, 2001. At the time of the examination, Claimant complained of left shoulder pain and stiffness. Dr. Hoffman noted that Claimant's records did indicate a previous diagnosis of a brachial plexus injury, however, the most current nerve tests were normal. He opined that these results indicated that the

[13]The medical records and reports from Dr. Hoffman at Southern Orthopaedic Specialists are reproduced as RX-15. These records have been considered by the Court in conjunction with his deposition testimony and will be referred to in the body of the opinion to the extent they add to his testimony.

brachial plexus trauma had resolved itself by the time of the second battery of EMG/NCV tests. RX-23, pp. 4-7.

An MRI of Claimant's shoulder showed a mild elevation of the AC joint, which pre-existed the accident. He based this on his observations that during the physical examination, both of Claimant's shoulders appeared to be slightly elevated and symmetric. Claimant had only a little restriction of motion, but complained of pain with motion. This restricted motion, Dr. Hoffman opined, could have been self-limiting. RX-23, pp. 7-11; RX-15, pp. 1-2.

Dr. Hoffman opined that Claimant might have had a Grade 1 AC separation from the accident. However, he felt that in a shock scenario, it was more common to sustain a dislocation, not a separation. Therefore, he opined that even if Claimant suffered a mild AC separation, it did not result from the electrical shock. He stated that he does not believe that Claimant needs surgery on his shoulder. In his opinion, Claimant was at maximum medical improvement at the time of his examination. RX-23, pp. 19-23.

Dr. Hoffman testified that he does not believe Claimant suffers from a frozen shoulder. He did agree, however, that the discontinuance of therapy and subsequent findings of bursitis or tendinitis in the shoulder, could lead to a frozen shoulder. He added that if an individual had a brachial plexus injury and did not move his shoulder in the full range of motion, the individual could similarly get a frozen shoulder. It was his opinion that the proper course of treatment after a diagnosis of a frozen shoulder would be to continue therapy and keep the shoulder in motion. He would recommend therapy until full range of motion is achieved. Finally, Dr. Hoffman stated he was not sure if Claimant had the pathology of a shoulder, meaning a capsulitis or frozen shoulder scenario. While he conceded that Claimant was cooperative during the examination, he could find no medical etiology for the restricted range of motion in Claimant's left shoulder. RX-23, pp. 25-45; RX-15, pp. 1-2.

Magnolia Diagnostics

Claimant underwent diagnostic testing under treatment of Dr. Charles Aprill on April 27, 2001. Dr. Aprill interpreted the MRI taken as showing a slight acromioclavicular separation. He opined that the findings were probably chronic. His ultimate impression was a slight upward distraction of the clavicle relative to the acromion, possibly reflecting an old partial AC separation. RX-9; CX-5.

III. NON-MEDICAL EVIDENCE

Christine Rangel[14]

Christine Rangel is a licensed occupational therapist employed by HealthSouth at St. John

[14]The medical records and reports from Christine Rangel at HealthSouth's St. John Therapy Center, are reproduced as RX-5 and CX-8. These records have been considered by the Court in conjunction with her deposition testimony and will be referred to in the body of the opinion to the extent they add to her testimony.

Physical Therapy. She testified that her primary focus is rehabilitation, mainly on the upper extremities and hands, as well as industrial therapy. Ms. Rangel stated that she worked with Claimant to increase his motion and decrease pain. She stated that Claimant was initially seen on August 30, 2000 by a co-worker, but she personally worked with Claimant thereafter. Ms. Rangel stated that by October 25, 2000 Claimant's range of active motion problems in his shoulder had resolved, but he still complained of shoulder pain following exertion. There were some inconsistencies in his range of motion testing. RX-19, pp 1-22.

Ms. Rangel opined that Claimant, throughout the course of his treatment, began building his tolerance to the therapy and gradually increasing his range of motion. He also reported doing his home exercises, although he experienced pain. She referred him to a physical therapist, specializing in necks and backs, who indicated that there was no cervical problem relating to Claimant's injury. In late September 2000, Ms. Rangel noted that some inconsistencies emerged with Claimant's subjective claims and his range of motion. In particular, she observed that he actively opened his left hand while distracted. During testing, however, he claimed to not be able to freely move this hand. Claimant's range of motion in his shoulder improved to the point that it was back to full range as of October 25, 2000. The range of motion in his left digits was still limited. RX-19, pp. 23-54.

She does not recall who personally discontinued Claimant's therapy, but did testify that the insurance company indicated to her office that it would not authorize further therapy. Ms. Rangel noted that if an individual does not use his arm and shoulder because of pain, it will lead to a frozen shoulder. Occupational therapy greatly reduces the chance for a frozen shoulder. Ms. Rangel felt that Claimant was cooperative, and on a scale of 1 to 10 she would give him a 9 or 10. She felt that on October 26, 2000, Claimant was not capable of returning to heavy work. RX-19, pp. 60-75, 98.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses who testified at the hearing and upon an analysis of the entire record, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

I. FACT OF INJURY AND CAUSATION

To establish a prima facie claim for compensation, a claimant does not need to affirmatively establish a connection between the work and the harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides the claimant with a presumption that his injury was causally related to his employment if he establishes two things. First, the claimant must prove that he suffered a physical injury or harm. Second, he must show that working conditions existed, or a work accident occurred, which could

have caused, aggravated, or accelerated the injury. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989).

1. CLAIMANT'S SHOWING OF A HARM

The first prong of a claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
> 33 U.S.C. § 902 (2).

An accidental injury occurs when something unexpectedly goes wrong within the human frame. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). Additionally, an injury need not involve an unusual strain or stress, and it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley; Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony may alone constitute sufficient proof of physical injury. See Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). The Court has the discretion to determine a witness' credibility, and may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

As an initial matter, this Court finds Claimant's testimony generally credible regarding the accident and subsequent events. However, the record contains evidence, specifically medical testimony and the functional capacity evaluation results, indicating some symptom magnification. This Court finds that these inconsistencies are more relevant to the extent of Claimant's injury as opposed to the mere fact that he was injured. Therefore, the issue of symptom magnification will be discussed in the nature and extent section of this opinion. Claimant's testimony regarding the accident is credible, and his testimony regarding his injuries is credible to the extent that it is supported by the medical evidence in the record.

In this case, Claimant contends that he suffers from left shoulder pain and weakness in his left hand stemming from an electrical shock that occurred in July 2000 at Respondent's facility. *See* TR. pp. 59-67. Respondent does not contest that Claimant sustained an injury during that time period, but asserts that the injury was confined to a burn, not an electrical shock. *See* Id. at pp. 442-450.

The specific injuries Claimant alleges are work-related consist of the neurological injuries to his left hand and shoulder (the brachial plexus injury), an AC joint separation, and a "frozen shoulder" condition. Since the issue of Claimant's third degree burn is not disputed as a work-related injury,

this Court will focus on the remainder of the injuries, which are contested by Respondent.

First, the neurological injuries to Claimant's hand and shoulder are documented throughout Claimant's post-accident medical history, lending credibility to his assertions that he continued to suffer pain and weakness in both areas. Claimant testified that after he was shocked by the welding lead, he noticed that his hand was burned and bleeding. *See* TR. pp. 67-78. Paul Truch, Claimant's supervisor, was on site at the time of the accident and confirmed that Claimant did have a visible burn on his hand, indicating that an electrical injury had occurred. *See* Id. at 202-211. Claimant testified that his left arm subsequently became numb en route to the hospital. *See* Id. at 67-78. Dr. Cummiskey, who examined Claimant in the emergency room following the accident, testified that Claimant exhibited decreased sensation in the left fingers and could not flex his left hand. *See* CX-16. Dr. Johnson, the orthopaedist who examined Claimant at River Parishes Hospital around the same time, also noted a neurological injury in that the median nerve in Claimant's left hand appeared to be affected. *See* RX-2, pp. 44-46.

The neurological condition in Claimant's shoulder area was later diagnosed by Dr. Carolyn Baker, a neurologist, as a mild brachial plexus injury. She stated that this condition affects nerve functioning in the shoulder and hand areas. *See* RX-21. This finding was independently confirmed by Dr. Maria Palmer, another neurologist. *See* CX-15. Given this evidence, this Court finds that Claimant's testimony of both hand and shoulder problems are corroborated by the medical evidence in the record. As a result, Claimant has presented sufficient evidence to meet the first prong of his prima facie case with respect to his neurological injuries.

Additionally, Claimant has sufficiently proven that he suffers from both an AC joint separation and a "frozen shoulder." Since these are two separate conditions in the shoulder, they will be addressed individually. As to the AC joint separation, an MRI scan, dated April 27, 2001, shows a slight acromioclavicular separation. *See* RX-9. Dr. Phillips opined that this AC joint separation is located in the same area as the brachial plexus injury, diagnosed by Dr. Carolyn Baker. *See* CX-13, pp. 62-67. While this Court finds that the link between the work accident and the appearance of an AC joint separation is

tenuous due to the passage of time, that issue is more appropriately addressed in terms of causation. For purposes of proving an injury, Dr. Phillips' findings, as supported by the MRI scan, are sufficient to prove an injury.

The medical findings also show that Claimant currently suffers from a "frozen shoulder." Both Claimant and his wife, Connie Johnson, credibly testified that he gradually became unable to use his left shoulder after his occupational therapy was discontinued. *See* TR. pp. 80-89, 203-206. Claimant's complaints of ongoing shoulder pain are also consistently noted in his treating physician's, Dr. John Williams', reports from July 2000 through November 2000. *See* RX-17, pp. 46-52. The neurologists' reports during this period of time also note ongoing shoulder pain. In particular Dr. Maria Palmer, who examined Claimant on December 18, 2000 opined that Claimant exhibited a gradually decreasing range of motion in his shoulder area. *See* CX-15, pp. 4-25. While she did not think that he had a frozen shoulder at the time, she opined that it was likely that he would develop

this condition. *See* Id. Dr. Phillips affirmatively diagnosed Claimant with the "frozen shoulder" condition on March 26, 2001. *See* CX-13, pp. 62-67. This medical evidence indicates that Claimant gradually developed the condition due to increasing pain in his shoulder area. Therefore, Claimant also has met the first prong of his prima facie case with respect to both his AC joint separation and "frozen shoulder" condition.

2. CLAIMANT'S SHOWING OF A WORK ACCIDENT

In order to invoke the §20(a) presumption, Claimant must also show the occurrence of an accident or the existence of working conditions which could have caused the harm. The Section 20(a) presumption does not assist the Claimant in establishing the existence of a work-related accident. See Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981). Therefore, a claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence. The Court must weigh all the record evidence, including that supporting claimant's testimony and that contradicting it, in order to determine whether he has met his burden in establishing a work accident.

It is undisputed that Claimant suffered a work-related accident on July 22, 2000. *See* CTX-1. However, Claimant asserts that he received both an electrical shock and a burn as a result of this work-related accident. *See* TR. pp. 59-67. Claimant stated that on the morning of July 22, 2000, he was pulling his welding lead out of the inside of a barge with both hands. *See* Id. He opined that the welding lead itself had a gash or nick in it, because when he grabbed the lead, he felt electricity flow into his left hand and radiate to his shoulder. *See* Id. He stated that he was not able to let go of the lead for approximately 4 or 5 seconds. *See* Id. When he did throw the lead down, it hit the deck and sparked. *See* Id. This Court finds that this electrical accident definitely could have been the cause of Claimant's hand and shoulder problems. First, he immediately reported the accident and onset of pain to his supervisor, Paul Truch. *See* TR. pp. 67-78, 214-228. The fact that he did not specifically report a shoulder injury at that time does not diminish his claim, given that it was likely Claimant was focused on the serious burn that he sustained and not his shoulder. Second, both physicians who examined him immediately afterwards in the emergency room, Drs. Roberts and Cummiskey, testified that further complications from an electrical accident, such as nerve injuries, might manifest after the trauma with little to no immediate symptoms. *See* RX-18, pp. 14-19; CX-16.

Sidney Gassen, the River Manager for the work site, testified that he did not see any signs at the work site of an electrical incident. *See* TR. pp. 229-242. He added that Claimant never reported being shocked. *See* Id. Joey Muth, an electrician, also testified that there were no signs of an electrical incident on either the deck of the barge or the welding line used by Claimant. *See* TR. pp. 338-341. This Court finds neither of these witnesses sufficient to contradict Claimant's version of events.

First, Mr. Gassen's testimony is too vague to contradict Claimant's version of events. Although, he stated that he investigated the accident two days after it occurred, he was not able to offer any alternative explanation for Claimant's version of events. He merely testified that there were no fresh marks, indicating that the welding line arced, on the barge's deck. *See* TR. pp. 229-242. Mr. Gassen's written report of the accident is similarly vague and contradictory. *See* CX-11, pp. 31-47. While he testified that there were no visible openings in the welding line, he stated in the report

that Claimant touched a "bare spot" in the same line, causing a burn. *See* Id. He also conceded at the hearing that he was informed of the possibility of an electrical shock, but failed to note that in his report. *See* TR. pp. 236-242. Due to his vague testimony and admittedly incomplete report, this Court finds that Mr. Gassen's testimony is insufficient to contradict Claimant's version of the accident.

Mr. Muth's testimony is also insufficient to rebut Claimant's version of the work accident. While he is a marine electrician and certainly qualified to opine as to the likelihood of an electrical shock on a barge or vessel, he did not examine the work site and welding equipment until more than a year after the accident had occurred. *See* TR. pp. 38-48, 338-341. Therefore, this Court finds that he could not make an accurate assessment of the conditions that existed in July 2000, when Claimant sustained his injuries.

The medical evidence regarding the nature of electrical injuries supports Claimant's testimony as to the events on July 22, 2000. While several of Respondent's physicians opined that Claimant had no exit wounds, indicating an electrocution, none of these physicians were able to rule out, with reasonable medical certainty, the possibility of an electrical shock. Claimant's emergency room physician, Dr. Roberts, testified that the presence of an exit wound was greatly dependent on the severity of the shock. *See* RX-19, pp. 55-57. Dr. Austin Sumner, who examined Claimant at Respondent's request, actually diagnosed that Claimant sustained an electrical shock. He opined that there were subtle alterations in Claimant's skin around the left fingers, indicating both an entrance location, the burn, and an exit location, the fingertips. *See* TR. pp. 265-277.

Both Drs. Roberts and Cummiskey, who examined Claimant soon after the work accident, testified that Claimant could have sustained neurological injuries, such as a brachial plexus trauma, from the accident. *See* RX-18; CX-16. Additionally, Dr. Palmer, a neurologist, opined that both a brachial plexus injury and an AC joint separation could result from an electrical shock. *See* CX-15. While Dr. Gregor Hoffman disagreed with Dr. Palmer's assessment of the AC joint separation and electric shock, he only stated that it was more common to sustain a dislocation from an electric shock, as opposed to a separation. *See* RX-23, pp. 19-23. He did not rule out the possibility of an electric shock causing an AC joint separation. Therefore, his testimony is insufficient, by itself, to contradict the medical evidence relating the neurological injuries to an electrical shock.

At least two other physicians, Dr. Truax and Dr. Sumner, opined that Claimant could not have sustained a brachial plexus injury as a result of the work accident. Dr. Truax, who examined Claimant six months after the accident opined that Claimant did not sustain a neurological injury to the brachial plexus area from the work accident. *See* TR. pp. 105-109. However, he conceded that Claimant's initial EMG/NCV tests indicated abnormal nerve functioning, and ordered additional testing, which indicates that he felt Claimant's condition was abnormal. *See* Id. Dr. Austin Sumner, a neurologist and expert in electrodiagnostic medicine, tested Claimant more than a year after the accident occurred. *See* TR. pp. 265-277. He also opined that Claimant did not sustain a neurological injury to either his left hand or his shoulder, the brachial plexus area. *See* Id. Given the medical testimony that a brachial plexus injuries can heal itself over time, this testimony does not contradict Drs. Baker's and Palmer's initial findings of abnormal nerve functioning in close proximity to the accident. These medical opinions, coupled with the objective testing done in close proximity in time to the accident date, indicate that the electrical shock could have been a cause of Claimant's

neurological, brachial plexus, injuries.

Claimant has also sufficiently proven that these neurological and joint injuries, stemming from the work accident, could have caused his "frozen shoulder." He was diagnosed with a frozen shoulder on March 26, 2001. *See* CX-13, pp. 62-67. The majority of the physicians in this case, even if they did not agree that Claimant had this condition, conceded that an injured shoulder can become immobile if not used on a regular basis. In this case, the progress reports from his neurologist indicates that after the discontinuance of his occupational therapy, Claimant gradually lost range of motion in his shoulder. *See* CX-15. In fact, as of February 12, 2001, Dr. Palmer noted that this loss made it likely Claimant would develop a "frozen shoulder." *See* Id. Given Claimant's credible testimony regarding his shoulder pain and the objective evidence indicating loss of motion in the shoulder area, it is feasible that Claimant's shoulder could become almost immobile due to lack of use.

Since Claimant's version of events and subsequent injuries are sufficiently supported by the medical documentation and opinions in evidence, this Court finds that his shoulder and hand neurological injuries, the AC joint separation, and his frozen shoulder could have developed from the accident at work in July 2000. As a result, this Court finds that Claimant is entitled to invoke the §20 presumption for both his hand and shoulder injuries.

II. NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, fn. 5, (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v.

Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, only one physician opined that Claimant had reached maximum medical improvement. Dr. Gregor Hoffman, an orthopaedist, opined that Claimant had reached maximum medical improvement by the time of his examination on November 2, 2001. *See* RX-23, pp. 19-23. However, this Court previously found that the medical evidence indicates that Claimant suffers from both a current AC joint separation and a "frozen shoulder" condition. While Dr. Hoffman opined that the AC joint separation would probably not be operable, he did opine that the frozen shoulder could be treated through intense therapy. *See* Id. This opinion is consistent with the neurologist's, Dr. Palmer's, opinion that Claimant would need therapy to restore a normal range of motion to his shoulder. *See* CX-15, pp. 50-59. Therefore, since there does appear to be further treatment needed, at least as to Claimant's "frozen shoulder" condition, this Court finds that Claimant has not reached maximum medical improvement and remains temporarily disabled.

The extent of disability can be either partial or total. Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. See Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

In this case, Claimant has sustained his burden of proving total disability. After July 22, 2000, Claimant was being treated for his burn injury. During this time, he was also undergoing neurological testing. He was taken off of work by Dr. Williams, the plastic surgeon who treated him for the burn, and assigned to attend occupational therapy. *See* RX-17, pp. 22-26. Additionally, this Court finds that Claimant's shoulder progressively became worse after his therapy was discontinued in October 2000. Dr. Maria Palmer noted that in her examinations in December 2000 and February 2001, Claimant exhibited a decreasing range of motion in his shoulder. *See* CX-15, pp. 40-59. She also stated that the diagnosed brachial plexus injury, affecting both his left shoulder and hand, would take several months to heal. *See* Id. Dr. Phillips testified that as of March 2001, Claimant had developed the "frozen shoulder"condition, due to lack of movement from either the brachial plexus or AC joint separation. *See* RX-8, pp. 1-10. Given that the condition of Claimant's shoulder continued to deteriorate due to pain from these condition, this Court finds that he could not work at his original welding position and was totally disabled from the date of his injury and continuing.

At this point, this Court notes that there are some credibility issues with respect to Claimant's alleged inability to work. After considering the medical testimony, it is apparent that Claimant does tend to magnify his symptoms when tested. This Court finds that Ms. Wolverton's testimony is credible in that Claimant gave sub-maximal effort on his functional capacity evaluation. *See* RX-6. This conclusion is bolstered by several physicians' testimony that Claimant, while cooperative, did not relay an accurate accounting of his current condition. *See* RX-11; RX-23; TR. pp. 105-112. However, the objective medical evidence from the time of injury and continuing does show some indication of abnormal nerve functioning, an AC joint separation, and a "frozen shoulder" condition. These conditions have been attributed by expert medical opinions, to the July 22, 2000 accident. Therefore, this Court will not completely discount Claimant's allegations of disability. However, in light of his inconsistencies in reporting his disability, this Court finds that he has not testified credibly that he has been totally disabled from working in any type of employment since July 22, 2000. Instead, this Court will rely on Ms. Wolverton's FCE that Claimant is, as of November 2000, able to perform at least at a sedentary level.

Total disability and loss of wage earning capacity become partial on the earliest date that the employer establishes suitable alternative employment. See Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, physical restrictions, and that he could secure if he diligently tried. See New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). A failure to prove suitable alternative employment results in a finding of total disability. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Respondent presented evidence from Nancy Favaloro, a vocational rehabilitation counselor, that there were six sedentary jobs, routinely available, that would be appropriate for Claimant in his current condition. *See* TR. pp. 312-318; RX-16. These positions would be full time and were available as of

September 2001. *See* Id. All six of these positions were approved by Claimant's vocational rehabilitation counselor, Edward Ryan. *See* TR. 451-456. The approved positions are:

1. Weigh Station Monitor for Louisiana – $9.31 per hour (GS-9).[15]

[15]At the hearing, Ms. Favaloro and Mr. Ryan disagreed about the exact salary for the weigh station monitor position. Ms. Favaloro testified that this GS-9 position paid $9.31 per hour, the midpoint hourly rate in the GS-9 range. However, Mr. Ryan stated that the weigh station monitor would start out at the lowest GS-9 hourly wage, which was $7.03. Both vocational counselors contacted individuals to verify their respective figures. This Court finds that Ms. Favaloro's conclusions regarding the salary are reasonable and based on the actual salary that Claimant would earn. Taking the midpoint of the GS-9 salary range is a fair and reasonable way to approximate the position's earning potential, especially when independently verified through her contact with the State. Therefore, when referencing this position, this Court will use

2. Unarmed Security Guard for Pinkerton Security – Minimum wage to $6.00 per hour.

3. Shuttle Bus Driver for Treasure Chest Casino – $7.00 per hour.

4. Maintenance position at Allfax – $7.50.

5. Sales Associate at Circuit City in Kenner, LA – $7.25 per hour.

6. Booth Cashier for New South Parking – $6.15 per hour. *See* RX-16.

This Court finds, based on Ms. Favaloro's and Mr. Ryan's testimony, that these full time positions are both suitable and available for Claimant in his current condition. These positions were available, according to Ms. Favaloro, as of September 2001. In light of the FCE, administered by Karmen Wolverton, these primarily sedentary positions fairly represent the residual loss of wage earning capacity sustained by Claimant as a result of his work-related accident. An average of the represented hourly wages, including Claimant's current hourly wage at his part-time job, yields an earning capacity of $6.90 per hour, totaling $276.00 per week for a forty-hour work week. Therefore, from September 1, 2001 and continuing, Claimant is entitled to temporary partial disability based on his pre-injury wage earning capacity, less his partial wage earning capacity of $276.00 per week.

After considering all of the available medical and vocational evidence, this Court finds that Claimant has sustained his burden of proof for temporary total disability from the date of the injury, July 22, 2000 until the date suitable alternative employment was established, September 1, 2001. From September 1, 2001 and continuing, Claimant sustained only a temporary partial disability.

As a final matter, it is undisputed that Employer/Respondent did pay Claimant compensation from July 26, 2000 through November 28, 2000 at $266.78 per week. *See* CTX-1. Therefore, Employer/Respondent is entitled to a credit for this compensation already paid.

3. AVERAGE WEEKLY WAGE

Section 10 of the LHWCA sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to section 10(d), in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Sections 10(a)-(b) of the LHWCA address the calculation of average annual earnings when an injured employee's work is regular and continuous. See 33 U.S.C.§910(a)-(b)(1984). Under these sections an injured employee's annual earnings are determined and then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. See 33 U.S.C. §910(d)(1984).

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the hourly wage rate of $9.31.

Section 10(a) applies when the employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. §910(a)(1984). Upon an examination of the evidence as to Claimant's wages and his own testimony, this Court finds section 10(a) applicable to this case since Claimant worked for Respondent substantially the whole year preceding the accident. Sidney Gassen, the River Manager for Respondent, testified that employees have discretion in their hours. *See* TR. pp. 229-235. He stated that most of the time they choose their own hours, but are required to work at least one weekend per month. *See* Id.

In Claimant's case, his wage records reflect that during some periods he worked a number of weekends, and other times he worked less hours during the regular week. *See* CX-12. After examining these wage records, this Court finds that Claimant's employment for 1999 and 2000 essentially consisted of a five-day work week, averaging 40 hours per week. Claimant's hourly wage was $11.25 during the time period prior to the accident. *See* Id. Accordingly, pursuant to section 10(a) his average weekly wage should be calculated by his annual earnings prior to the accident. These earnings total $21, 183.50. *See* Id. Dividing this figure by 52 weeks in the year, for a five-day, 40-hour work week, yields an average weekly wage of $407.00. This represents a corresponding compensation rate of $271.00.

4. REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curium), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland

Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g, 6 BRBS 550 (1977).

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so. 33 U.S.C. § 97(d)(2).

This Court found that Claimant did sustain a work-related injury to his left hand and shoulder from an electric shock received at work. Claimant is temporarily disabled from this work-related accident. Therefore, he is entitled to reasonable and necessary past and future compensable medical treatment associated with his work-related injury. This includes diagnostic testing and treatment for his left hand and shoulder, the AC joint separation, brachial plexus injury, and decreased range of motion. There are conflicting medical opinions as to what kind of treatment is necessary for Claimant's AC joint separation. Dr. Phillips recommends an arthroscopic exam and surgery for the AC joint. *See* CX-13, pp. 32-37. Drs. Palmer and Hoffman, on the other hand, would recommend only occupational therapy to restore range of motion to the shoulder area. *See* CX-15, pp. 50-59; RX-23, pp. 25-45. Dr. Hoffman specifically opined that an arthroplasty was a highly invasive operation and not necessary for a minor AC joint separation. *See* RX-23, pp. 19-23.

After examining the medical evidence, this Court finds that Claimant is entitled to occupational therapy to restore motion to his left shoulder and any other reasonable or necessary medical expenses, diagnostic and treatment costs, associated with the neurological problems in the shoulder and hand. In light of the conflicting reports as to proper treatment for the AC joint separation, this Court specifically finds that Claimant has sustained his burden of proof for entitlement to an arthroscopic exam in order to determine if surgery to restore the AC joint separation is necessary.

5. PENALTIES

Claimant also alleges that penalties should be assessed against Respondent for terminating compensation and medical benefits in November 2000. However, Claimant has cited no legal basis or authority for its request. Respondent timely filed its Notice of Controversion on December 4, 2000, citing that: 1) Claimant grossly exaggerated his symptoms; 2) He was abusive to Respondent's personnel; 3) His injuries have been misdiagnosed to date; and 4) Claimant's complaints were not work-related. *See* RX-1; CX-1. Claimant sustained an electrical injury, an injury, which several physicians testified was difficult to treat and diagnose by its very nature. This Court finds that Respondent's controversion of the claim was based, although incorrectly, on what it believed were reasonable grounds at the time of the controversion. Therefore, an assessment of penalties, in absence of any articulated legal basis, is inappropriate.
Accordingly,

ORDER

It is hereby **ORDERED**, **ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant any unpaid compensation for temporary total disability benefits from July 22, 2000 through August 31, 2001 based on the average weekly wage rate of $407.00;

(2) Employer/Carrier shall pay to Claimant any unpaid compensation for temporary partial disability benefits from September 1, 2001 and continuing, subject to the limitations of section 8(e), based on the average weekly wage rate of $407.00 and reduced by his residual weekly wage earning capacity of $276.00;

(3) Respondent/Carrier shall be entitled to credit for any compensation previously paid to Claimant;

(4) Respondent/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. *See* 28 U.S.C. §1961;

(5) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, consistent with this opinion, with interest in accordance with Section 1961, relating to his hand and shoulder conditions. *See* 33 U.S.C. §907; and

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge

RDM/sls